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THE MEANING OF THE PRECAUTIONARY PRINCIPLE FOR THE ASSESSMENT OF CRIMINAL MEASURES IN THE FIGHT AGAINST TERRORISM

Matthias Borgers^{*}
Elies van Sliedregt^{*}

Abstract

Criminal lawyers and criminologists often refer to contemporary society as the risk society, dominated by an awareness and fear of risks that threaten security: for instance, terrorist attacks. Governments respond to this fear by taking measures that prevent such risks as much as possible. This has led to the development of a concomitant change to preventive criminal justice, illustrated most prominently with regard to recent anti-terrorism legislation. There is much debate in criminal law circles, engaging both scholars and politicians, on the need for preventive criminal law. Different points of view are expressed. Often, the framework against which preventive criminal law is assessed is human rights law: in European circles, the European Convention for the Protection of Human Rights. In this paper, we opt for a different approach: preventive criminal justice is evaluated on the basis of the precautionary principle.

^{*} Both authors are Professors of Criminal Law and Criminal Procedure at the VU University in Amsterdam. This article is based on M.J. Borgers, *De vlucht naar voren* (*The way forward*) VU inaugural lecture (The Hague: Boom Juridische Uitgevers 2007) and E. van Sliedregt, *Tien tegen één* (*Ten to One*), VU inaugural lecture (The Hague: Boom Juridische Uitgevers 2009).

1 Introduction

It is a more or less established fact that we live in a risk society, a notion that is supported by references to sociological and criminological studies. Frequently mentioned studies are *Risk Society* by Ulrich Beck and *The Culture of Control* by David Garland.¹ While these two studies have laid the groundwork for the study of criminal justice in current society, their line of argument varies considerably. Beck's argument essentially entails that technological innovations have occurred so rapidly in society that they have given rise to uncontrollable risks. Because of this, the modernisation process not only results in an increase in prosperity but is characterised at the time by threats that are the product of human hands. Consequently, contemporary society is, on the one hand, focused on controlling and managing the risks and, on the other hand, spreading the risks across the societal actors. Beck had in mind mainly ecological developments and the stability of financial markets, although he subsequently related his (*world*) *risk society* explicitly to the threat of terrorist attacks as well.² Beck barely deals with criminal law. Garland, however, does. His analysis is intended as an explanation for a radical change in ideas on the approach to crime. A multiplicity of developments have led to loss of the perspective in the United States and the United Kingdom, on which Garland focuses, in which 'real' solutions are sought for crime; for example, by placing a strong accent on resocialisation and an improvement in socio-economic conditions. Most of the attention is now paid to controlling crime and the risks of crime. The use of criminal law as an instrument to control safety risks has become part of an all-encompassing *culture of control*.

What connects these and related studies is that they map out diverse social, legal, economic, and political developments that are the cause or possible explanation of the fact that in modern times the central notion is the protection of citizens against all manner of dangers.³ This means that the use and desirability of preventive action is placed in the foreground, where it also concerns criminal law.⁴ This development is 'foreign' to the system in a certain sense. After all, criminal law proceeds from the standard model in

¹ U. Beck, *Risk Society. Towards a New Modernity* (London: Sage 1992, reprint 2005); D. Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press 2002).

² U. Beck, 'The Terrorist Threat. World Risk Society Revisited' (2002) 19 *Theory, Culture & Society* 39.

³ See for example B. Hudson, *Justice in the Risk Society. Challenging and Re-affirming Justice in Late Modernity* (London: Sage 2003), H. Kemshall, *Understanding Risk in Criminal Justice* (Maidenhead: Open University Press 2003) and D. Denney, *Risk and Society* (London: Sage 2005).

⁴ Cf. R. Pieterman, *De verzorgcultuur. Streven naar veiligheid in een wereld vol risico en onzekerheid* (Den Haag: Boom Juridische Uitgevers 2008) at 122.

which action is taken on the basis of harm that has already occurred. The background of this is both instrumental and based on the legal protection. On the one hand, the repressive approach is based partly on the presumption that people are rational actors and are therefore deterred by the threat of the penalty that can be imposed if they act in conflict with the rules. On the other hand, preventive action entails the risk that – in retrospect – people are wrongfully subjected to far-reaching measures.⁵ Indeed, there are strong arguments to be critical of preventive criminal justice, if only from the point of legal protection of the suspect. However, there is another side to the latter arguments. What if people are shown not to act so rationally that they are deterred by the threat of punishment? And does avoidance of the risk of ‘false positives’ automatically outweigh the misery experienced if action cannot be taken in time? Precisely these considerations arise when a serious threat is experienced and fear sets in.⁶

2 Definition of the problem and plan of approach

In this paper, we consider the emergence of preventive measures in criminal law and the concomitant shift of the scales in the weighing of the interest of safety against the interest of legal protection as an established fact. This does not mean, however, that this development is considered desirable. There is much debate in criminal law circles, engaging both scholars and politicians, on the perceived need for preventive criminal law. This issue has been most vigorously debated with regard to anti-terrorism legislation. The feature of the latter debate is that those who engage in it tend to reason from one specific point of view. When legislators adopt counterterrorism measures, they assume without giving a further or satisfactory explanation that there exists a serious threat of terrorism, which requires preventive action through criminal law. This has led to amendments to substantive criminal law and the law of criminal procedure. Only reasons that favour such amendments are relied upon; scant attention is paid to the disadvantages that attend these particular measures. The argumentation pattern of critics of such measures concentrates precisely on these disadvantages. Preventive criminal law measures are assessed against the human rights framework: the European Convention for the Protection of Human Rights.⁷ Taking the whole into

⁵ A.M. Dershowitz, *Preemption: A Knife That Cuts Both Ways* (New York: W.W. Norton & Company 2006) at 7 and 19.

⁶ Cf. for example W. Hoffmann-Riem, ‘Freiheit und Sicherheit im Angesicht terroristischer Anschläge’ (2002) *Zeitschrift für Rechtspolitik* 497 at 499.

⁷ An illustration of such an assessment of counterterrorism measures is the recently published report ‘Assessing Damage, Urging Action’ by the International Commission of Jurists. We endorse many of the points of the analysis in this report.

consideration, the image therefore arises of a stratified and polarised debate: positions are exchanged, but each of the two strata reasons on the basis of a single point of view, that of the expected advantages or the foreseen disadvantages. A weighing of interests in such a way that advantages and disadvantages are actually viewed in their interrelationship does not take place.

In this paper, we adopt a different point of view. This is not because we disagree with the arguments that are raised. What concerns us is the question of whether a more integrated assessment of preventive measures is possible in order to avoid a stratified and polarised debate as sketched above. We wish to explore the extent to which it is possible to arrive at a normative assessment of the developments in criminal law on the basis of another argument/norm: the precautionary principle. The full extent of this assessment could not be included in this paper and has been elaborated elsewhere.⁸ Firstly, since it is impossible to discuss all relevant legislative developments in criminal law, we limit ourselves to discussing anti-terrorism legislation. Secondly, a limit lies in viewing the precautionary principle in the light of Sunstein's *Laws of Fear*.⁹ Thirdly, rather than presenting an all-encompassing normative framework, we aim to outline some viewpoints that are important for a normative assessment of anti-terrorism measures. Our main contention is that no proper evaluation is possible without full knowledge of the actual threat and the effectiveness of certain measures. Only after all arguments *pro* and *contra* have been taken into consideration can one properly appraise anti-terrorism measures. Our considerations relate to the *manner* of assessment rather than its outcome.

We use the following plan of approach. In Section 3, developments in the Netherlands relating to counterterrorism legislation are discussed and compared to developments in Italy, Germany, England, and the United States. This section ends with a list of the common characteristics of the legislation in these countries. Section 4 deals with the substance of the precautionary principle on the basis of Sunstein's book and the criticism of that principle. From there, partly on the basis of the anti-catastrophe principle mentioned by Sunstein, we discuss the meaning of the precautionary principle for the fight against terrorism under criminal law. In

One must, however, note that such findings are somewhat one-sided. Precisely because individual rights to liberty are taken as a starting point, the view focuses mainly on the disadvantages of counterterrorism policy. The arguments in favour of taking preventive measures are not mentioned or are worked out only superficially.

⁸ M.J. Borgers, *De vlucht naar voren (The way forward)*, VU inaugural lecture (The Hague: Boom Juridische Uitgevers 2007).

⁹ C.R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press 2005).

Section 5 we formulate several viewpoints that may be useful in the assessment of anti-terrorism legislation.

3 Criminal law and terrorism: developments in and outside the Netherlands

3.1 Counterterrorism legislation in the Netherlands

In the 1970s, the Netherlands was faced with terrorism in the form of Moluccan actions. The government responded with a policy based on dialogue and negotiation. This was known abroad as ‘the Dutch approach’. A brief anecdote illustrates how the Dutch attitude towards terror has changed.

In 1970, when a group of Moluccan youths occupied the official residence of the Indonesian ambassador in Wassenaar, Premier Piet De Jong and Foreign Affairs Minister Joseph Luns went to Wassenaar. They moved into a house opposite the residence, from which they conducted negotiations with the hostage takers. At a given moment, they left the house and explored the garden of the residence and, as one of them was proudly able to relate later, even came within shooting distance of the Moluccans. Luns even tried to climb over the iron gate but this action failed. He fell from the gate and landed awkwardly.

This almost naive manner of fighting terrorism, which otherwise ended well – the hostage takers surrendered after a few hours – is not representative (for its lack of professionalism) of the *whole* of the 1970s. In later actions, professional negotiators were employed and a crisis centre was set up, far from the scene of the disaster. The example nevertheless gives a good illustration of the primacy of negotiation.

A major difference between fighting terrorism in the 1970s and nowadays is that since 11 September 2001, the government has pinned its faith on the criminalisation of terrorism. The ‘Dutch approach’ to negotiation has faded completely into the background. Islamic terrorism, of course, is very different in nature from Moluccan terrorism. The latter was not religiously inspired, remained confined to the Netherlands as a movement, and did not pursue narrowly defined political goals. But that did not make it less dangerous. On the contrary, the Moluccan actions, including two train hijackings and the occupation of a primary school, claimed more victims in the Netherlands than the Islamic terrorism that has held the world in its grip since the attacks on the World Trade Center.

What measures has the Dutch legislature introduced since 2001? We mention the most striking:

Firstly, a broadening of criminal liability by criminalising the preliminary stage before a harmful act has taken place. The Dutch Terrorism

Act (Wet terroristische misdrijven) has resulted in more severe sentences for the commission of certain (common) crimes committed with a terrorist purpose, criminal conspiracy has been expanded,¹⁰ and recruitment for 'armed combat' (i.e. jihad) has become a criminal offence.¹¹ The most recent offshoot of the expansion of criminal liability is participation and cooperation in setting up a terrorist training camp;¹²

Secondly, an expansion of investigatory and prosecutorial power with regard to terrorism.¹³ 'Indications' of a terrorist crime are already sufficient as a threshold that triggers special investigative powers, while a 'reasonable suspicion' was previously required. Furthermore, pre-trial detention is possible on the basis of an 'ordinary' suspicion instead of the more stringent requirement of 'incriminating evidence'. This can last until the start of the trial, subject to a maximum of 27 months. During that period, the accused can be denied access to his file and to incriminating evidence against him;

Thirdly, the possibility to use official notifications from the AIVD (General Intelligence and Security Service) as evidence in a criminal case and provisions for a special procedure in which an AIVD official can be heard by the examining judge as a protected witness;

Fourthly, the possibility to prohibit terrorist organisations included on a UN or EU sanction list, as a result of which assets can be frozen and possessions liquidated. Participation in the continuation of the activities of such an organisation is punishable by a one-year term of imprisonment.

¹⁰ Bulletin of Acts and Decrees (*Staatsblad*) 2004 at 290 and 373.

¹¹ For a comprehensive discussion of the 'Wet Terroristische Misdrijven', see J.M. Lintz, *De plaats van de Wet terroristische misdrijven in het materiële strafrecht. Een onderzoek naar de wederzijdse beïnvloeding door de Wet terroristische misdrijven en het Wetboek van Strafrecht en enkele bijzondere wetten* (Nijmegen: WLP 2007). See also M.J. Borgers, 'Strafbaarstellingen in de strijd tegen terrorisme. Werving ten behoeve van de gewapende strijd en samenspanning tot terroristische misdrijven', in A.H.E.C. Jordaans and others (eds.), *Praktisch strafrecht Liber Amicorum J.M. Reijntjes* (Nijmegen: WLP 2005) at 25.

¹² To be included in the new provision 134a Sr. Parliamentary papers II, 2007-2008, 31 386, nr. 3 at 5. See T. Barkhuysen and others, 'Mensenrechten-Actualiteiten' (2008) 33 *NJCM-Bulletin* 554.

¹³ For a discussion, see Borgers, above n. 8, at 44; P.H.P.H.M.C. van Kempen, 'Terrorismebestrijding door marginalisering van strafvorderlijke waarborgen' (2005) 80 *Nederlands Juristenblad* 397; Th. De Roos, 'Opsporingsbevoegdheden verruimd in de strijd tegen terrorisme. De nieuwe wetsvoorstellen helpen niet' (2006) 86 *Advocatenblad* 176; P.A.M. Verrest, 'Wet ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven' (2007) 56 *Ars Aequi* 158.

3.2 Counterterrorism legislation outside the Netherlands

It is clear that these developments in the Netherlands do not stand alone. Since 9/11, many countries have taken measures to fight terrorism. We outline briefly, by way of random samples, the developments in Italy, Germany, the UK and the US. These countries were selected because of the mix of common and civil law (the UK and the US v. the Netherlands, Germany and Italy) and for their experience or lack of experience with fighting terrorism under criminal law before 9/11 (Germany, Italy and the UK v. the US and the Netherlands).

3.2.1 Italy

Italy, which had already taken radical measures in the 1960s and 1970s to combat domestic terror from both leftists (Brigate Rosse) and rightists (neo-fascists), passed anti-terrorist legislation after 9/11. Inciting, forming, organising, leading, or financing terrorist organisations were made punishable.¹⁴ Later, in a second set of measures just after the bomb attacks in London in 2005, the commission of crimes for terrorist purposes¹⁵ and the recruitment¹⁶ and training of terrorists were added.¹⁷ In certain cases, a person can be held in preventive custody for five days without an actual suspicion, during which time that person may be examined without the assistance of a lawyer.¹⁸ Strict immigration measures have also been adopted: administrative detention and deportation of non-nationals is possible if they appear to constitute a threat to national security. In addition,

¹⁴ Art. 270bis: (1) Codice penale: Chiunque promuove, costituisce, organizza o dirige o finanzia associazioni che si propongono il compimento di atti di violenza con finalità di terrorismo o di eversione dell'ordine democratico (2) è punito con la reclusione da sette a quindici anni.

Amended by Act n. 438, 2001 (Decreto-Legge 18 ottobre 2001, N. 374 coordinato con la Legge di Conversione 15 December 2001, n. 438 (Disposizioni urgenti per contrastare il terrorismo internazionale). See <www.parlamento.it/parlam/leggi>. For comments infra: L. Filippi, 'Terrorismo internazionale: le nuove norme interne di prevenzione en repressione' (2002) 2 *Diritto Penale en Processo* 163; V. Patanè, 'Recent Italian Efforts to Respond to Terrorism at the Legislative Level' (2006) 4 *Journal of International Criminal Justice* 1166; *Italian Contribution to the NCTb (National Coordinator for Counterterrorism) Counterterrorism Project, Research and Documentation Centre (WODC)*, Università degli Studi di Trento – Università Cattolica del Sacro Cuore Milano (Milan, January 2006) at 24.

¹⁵ Art. 270 sexies (Condotta con finalità di terrorismo).

¹⁶ Art. 270 quarter (Arruolamento con finalità di terrorismo anche internazionale).

¹⁷ Art. 270 quinquies (Addestramento ad attività con finalità di terrorismo anche internazionale).

¹⁸ Art. 13 Act n. 155, 2005 (Nuove disposizioni in materia di arresto e di fermo).

some legal constraints on recording confidential communication and gathering information have been removed.¹⁹ Such information is gathered for preventive purposes: namely, information thus obtained may be used only for the purposes of investigation and not at the trial itself. The basis is vague: 'when it is indispensable for the prevention of terrorist activities'. The authority can be exercised for 40 days and can constantly be extended by 20 days: indefinitely therefore, in theory.

3.2.2 Germany

Germany also has past experience with counterterrorism. In the 1960s and 1970s, it was engaged in a fight against the Rote Armee Fraktion (RAF). Several far-reaching counterterrorism laws were passed.²⁰ The most well-known and controversial measure from that period is the *Kontaktsperregesetz*,²¹ which made it possible to detain RAF suspects in complete isolation and seriously limited their right to legal assistance.²² Eight days after the attacks on the WTC in New York, the German government presented a set of counterterrorism measures to Parliament.²³ This legislative initiative can be understood against the background of the discovery/ascertainment that three of the four Arabian hijackers lived in Hamburg and had planned the attack on the WTC there. The definition of the crime 'membership of a terrorist organisation' was expanded and was also declared applicable to foreign/international terrorism²⁴ and the right of association was restricted.²⁵ In a second set of measures, the security services were given wider powers, immigration laws were tightened, and the exchange of information and storage of data was facilitated.²⁶ While no new criminal provisions or powers were created, an old investigation method

¹⁹ Art. 226 (Intercettazioni telefoniche preventive).

²⁰ Gesetz zur Ergänzung des Ersten Gesetzes zur Reform des Strafverfahrensrechts vom 20. Dezember 1974, BGBl. 1974 I, 3686; Gesetz zur Änderung des Strafgesetzbuches, des Strafprozessordnung, des Gerichtsverfassungsgesetzes, des Bundesrechtsanwaltsordnung und des Strafvollzugsgesetzes vom 18 August 1976, BGBl. 1976 I, 2181; Gesetz zur Änderung der Strafprozessordnung vom 14 April 1978, BGBl. 1978 I, 497.

²¹ 30 September 1977 (BGBl. I S 1877).

²² The BVerfG ruled that the Act was constitutional, 1 August 1978, BVerfG 49, 24.

²³ Terrorismusbekämpfungsgesetz (TBG), 9 January 2002, BGBl. I, 2002 at 361.

²⁴ Vierunddreißigstes Strafrechtsänderungsgesetz - § 129b StGB vom 22. August 2002, BGBl. 2002 I, 3390.

²⁵ Erstes Gesetz zur Änderung des Verinsgesetzes vom 14. Dezember 2001, BGBl. 2001 I, 3319.

²⁶ Terrorismusbekämpfungsergänzungsgesetz (TBEG), 5 January 2007, BGBl. I, 2007 at 78.

from the RAF period was dusted off and reintroduced: the ‘*Rasterfahndung*’.²⁷ ‘*Rasterfahndung*’ is the method of searching the files of banks, libraries, universities, benefit agencies, and airline companies, without criminal suspicion, for the purpose of using a certain profile or specific characteristics to trace and keep an eye on suspect persons or dormant cells.

3.2.3 The United Kingdom

Britain has ample experience with fighting terrorism on its own territory. The fight against the IRA dates from 1922 and since that time different measures have been adopted, both criminal and non-criminal. Emergency legislation in those years made internment and preventive detention possible.²⁸ This line has been further pursued since 9/11. For instance, the Anti-Terrorism, Crime and Security Act (ACTSA) 2001²⁹ provides for the administrative detention of foreign terrorism suspects against whom there is insufficient evidence to involve them in criminal proceedings.³⁰ In 2004, the House of Lords ruled that the detention order was in conflict with the right to liberty and the prohibition of discrimination on the grounds that the measure affects only non-nationals.³¹ The successor to the ACTSA, the Prevention of Terrorism Act (PTA) 2005,³² provides for house arrest or ‘control orders’ instead of detention.³³ Breach of the conditions under which a control order

²⁷ For a critical review, see for example R. Gössner, ‘Computergestützter Generalverdacht. Die Rasterfahndung nach “Schläfern” halten einer bürgerrechtlichen Überprüfung kaum Stand’ (2002) 41 *Vorgänge* 41.

²⁸ For a good overview see Clive Walker, *Blackstone’s Guide to the Anti-terrorism legislation* (Oxford: Oxford University Press 2002).

²⁹ The Anti-Terrorism, Crime and Security Act (ACTSA) 2001 (14 December 2001) available at <www.opsi.gov.uk/Acts>. See H. Fenwick, ‘Legislation: The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?’ (2002) 65 *Modern Law Review* 724.

³⁰ Part 4 (Immigration and Asylum – Suspected international terrorists), section 23 (Detention).

³¹ *A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department* (Respondent), 16 December 2004, [2004] UKHL 56.

³² The Prevention of Terrorism Act (PTA) 2005 (11 March 2005) available at <www.opsi.gov.uk/Acts>.

³³ The Act provides for two types: a control order that *restricts* the right to liberty and a control order that *violates* the right to liberty (section 1(10)(a) PTA 2005). In the latter case, this is a ‘derogating control order’, an order that, on the basis of Article 15 ECHR derogates from the rights guaranteed by the ECHR because an emergency situation exists. A ‘derogating control order’ can be imposed by a court at the request of a Minister if ‘on the balance of probabilities’ (the civil standard of proof) a suspect is involved in terrorism-related activities (section 4(7)(A) PTA 2005).

is imposed is a criminal offence.³⁴ The bomb attacks in London in 2005 were the trigger for the adoption of the Terrorism Act (TA) 2006.³⁵ The Act introduced several new crimes: for example, inciting and preparing terrorism, distributing terrorist writings, training terrorists, and merely being present at places where terrorists are trained.³⁶ In criminalising terrorism, the legislature has made use of reverse onus provisions, a legislative technique that dates back to the 'Diplock report',³⁷ and antiterrorism legislation in Northern Ireland.³⁸ Procedural measures in the TA 2006 pertain to the extension of 'detention without charge' from 14 to 28 days.³⁹ The original Bill went further and provided for 90 days detention. Blair defended the 90-day rule in the House of Commons by arguing that the police and judicial authorities need more time to gather incriminating evidence against terrorism suspects in order to prepare for a trial. He did not win the desired support. This episode will go down in history as Blair's first defeat in the House of Commons. His successor Gordon Brown won the approval of the House of Commons for an extension to 42 days, but was defeated in the House of Lords.⁴⁰

3.2.4 United States

The most talked about counterterrorism legislation is undoubtedly that of the US. From 2001, the Bush administration – which ended in January 2009 – pursued a policy characterised by the expansion of executive powers and the marginalisation of civil rights and liberties. The USA PATRIOT ACT 2001, a framework act in which a large number of laws are amended, contains a definition of terrorism on American territory⁴¹ and provides for the criminalisation of harbouring terrorists and providing 'material support' to

³⁴ Section 9 PTA 2005. For a critical discussion, see L. Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174.

³⁵ The Terrorism Act (TA) 2006 (30 March 2006) available at <www.opsi.gov.uk/Acts>.

³⁶ Sections 1, 5, 2, 6 and 8, respectively, of the TA 2006.

³⁷ Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, Cmnd. 5185, London, 1972.

³⁸ Section 7 Emergency Powers Act 1973.

³⁹ Section 23(7) TA 2006.

⁴⁰ On 14 October 2008, with 309 against 118 votes. See 'Falconer leads assault on 42-day plan' available at <www.guardian.co.uk/politics/2008/oct/14/terrorism-uksecurity1>.

⁴¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), H.R. 3162, October 24, 2001, Section 802 (a): Domestic Terrorism Defined - Section 2331 Title 18, United States Code.

terrorism.⁴² Other measures are for the purpose of widening the powers of the security services, the National Security Agency (NSA) and the CIA, including wiretapping and tracing number data.⁴³ A commotion arose in 2004 when telecom companies were revealed to have given security services access to all their number data by order of the President and without court intervention, thereby allowing anyone and everyone to be wiretapped by these services. A law was recently passed providing for a prior judicial review, albeit a limited one. The most controversial measure is the detention of 'enemy combatants' at Guantánamo Bay, Cuba. These persons are detained on the basis of the laws of war, though only a few have been prosecuted. Criminal prosecution takes place before a military commission.⁴⁴ The rules of procedure and evidence of military commissions differ from those of regular criminal proceedings and courts martial. The prohibition on using pressure in interrogating suspects has been qualified; evidence obtained under pressure may be used under certain circumstances.⁴⁵ The rules of evidence have also been eased: anonymous and hearsay evidence from witnesses is admissible. The burden of proof is on the accused to show that such evidence is unreliable or has no 'probative value'.⁴⁶ The accused has no right to 'disclosure' of information that could jeopardise national security. The military commission judge may nevertheless order that a summary of such information be disclosed to the accused.⁴⁷

3.2.5 Characteristics of counterterrorism legislation

From the survey of measures in the Netherlands and elsewhere I have derived several characteristics of counterterrorism legislation:

Firstly, criminalisation in the early preliminary stage, or to use the German term: *Vorfeldkriminalisierung*. This occurs in all the countries studied. Criminalisation in the preliminary stage is made permissible in different ways: in an 'external' objective way, by criminalising certain acts of endangerment, and in an 'internal' subjective way by criminalising the

⁴² USA PATRIOT Act, H.R. 3162, 24 October 2001, Section 805 (a) In general, see Section 2339A of Title 18, Unites States Code.

⁴³ USA PATRIOT Act, H.R. 3162, 24 October 2001, sections 201-225.

⁴⁴ An Act to authorise trial by military commission for violations of the law of war, and for other purposes ('Military Commissions Act 2006), H.R. 3930, 3 January 2006.

⁴⁵ Military Commission Act 2006, § 948 r (Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements) sub c (Statements obtained before enactment of Detainee Treatment Act 2005) and sub d (Statements obtained after enactment of Detainee Treatment Act 2005).

⁴⁶ Military Commissions Act, § 949a (Rules) (E) (ii).

⁴⁷ Military Commissions Act, § 949j (c) (Protection of Classified Information)(B).

purpose for which a certain action is performed.⁴⁸ In the UK, criminalisation at the preliminary stage is based on the objective model; these are crimes of endangerment. The Netherlands has chosen to focus on the terrorist purpose and has therefore adopted a subjective criminalisation model;

Secondly, a broadening of investigative powers. The lower threshold of 'indications' in the Netherlands is one example. In Italy, the threshold that triggers the application of investigative powers has even been completely separated from an actual offence. Confidential communication can be recorded if it is 'indispensable for the prevention of terrorist activities' 'Rasterfahndung' in Germany goes just as far.⁴⁹ Without criminal suspicion, files of banks, libraries, and universities can be searched in order to use a certain profile to trace dormant cells;

Thirdly, an expansion of the permissibility of pre-trial detention. This is already possible in the Netherlands on the basis of an 'ordinary' suspicion. In the UK the possibility of detention without charge has been extended, as likewise in Italy, where five days' preventive detention is permissible without an actual suspicion, during which time the detainee can be examined without the assistance of a lawyer;⁵⁰

Fourthly, the use of non-criminal measures to achieve a similar repressive effect. This practice is best illustrated by the detention of 'enemy combatants' at Guantánamo Bay. The British practice of control orders also falls under this heading; they are effectively a type of house arrest. The sanction lists can also be defined as quasi-criminal on grounds of their punitive effect. It is worth noting that in several of these measures, criminal law is 'smuggled in' through the back door. Violation of a control order is a criminal offence, as is participation in an organisation on a sanction list.

From these four characteristics of anti-terrorism legislation it is not hard to draw the overall conclusion that these measures are all centred on the notion of 'prevention'.

⁴⁸ A subjective approach has been chosen in the Netherlands. Stamhuis regrets this and argues that it would have been more logical for the legislature to criminalise terrorist crimes and conspiracy, just like the other crimes of endangerment in the Dutch Penal Code, by using the objective model. E.F. Stamhuis, *Gemeen gevaar* (Nijmegen: WLP 2006) at 21.

⁴⁹ Art. 226(1) Codice di Procedure Penale: '... quando siano ritenute indispensabili per la prevenzione di attività terroristiche ...'.

⁵⁰ Art. 13 Act n. 155, 2005 (Nuove disposizioni in materia di arresto e di fermo).

4 Prevention as the point of departure for criminal legislation

4.1 The precautionary principle

The precautionary principle was developed mainly in areas of law aimed at protection of the environment and public health.⁵¹ Generally speaking, the precautionary principle entails that if and when a threat of serious or irreparable harm arises, a lack of scientific certainty cannot apply as a reason not to take or to postpone preventive measures. Such uncertainty relates to the occurrence of the harm. The precautionary principle prevents taking action only when it has been sufficiently or irrefutably established that harm will occur or has already occurred. In that case, it may no longer be possible to take effective measures to remedy the harm, while imposing an obligation to pay compensation can also be a complex matter: for example, because of a multi-causal connection. The precautionary principle can be used in different gradations of ‘mandatoriness’.⁵² In the formulation used above, the principle is still reasonably weak. It states only that a lack of conclusive evidence in itself does not prohibit the taking of measures.⁵³ This does not mean that the lack of such evidence may no longer play a part in the decision-making process, which actually centres on the question of how much risk one is willing to bear, given the scientific uncertainty regarding the harm.

In a much stricter variant, the precautionary principle can be viewed as the obligation to use a safety margin at all times in the decision-making process. This gives rise to a normative action principle: if serious or irreversible harm can occur, action – taking precautionary measures – is *mandatory*. In that formulation, there is room for inaction only if it has been irrefutably established that no harm will occur. But because of the uncertainty regarding the occurrence of the harm, inaction is in fact no option.⁵⁴ We do not consider the extent to which this mandatory formulation of the precautionary principle is actually professed in relation to

⁵¹ The precautionary principle and ‘the principle of preventive action’ are referred to, for example in Art. 174 EC Treaty.

⁵² The following interpretation of the precautionary principle is taken from Sunstein, above n. 9, at 18. For a summary of the literature about the precautionary principle, see Pieterman, above n. 4, at 37.

⁵³ To this extent, the precautionary principle relates to ‘... regulating the *reasons* for a decision and the basis for action.’ See L. Fisher, ‘Book review: Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge: Cambridge University Press, 2005’ (2006) 69 *Modern Law Review* 288.

⁵⁴ It is doubtful as well whether science can produce conclusive proof that there is *no* relationship between activity and harm. The results of a study can never be anything but that *this* study does not show any relationship. The reverse is also true: research showing that a relationship does exist can always be falsified by later research.

environmental protection and public health.⁵⁵ It is noteworthy that this action logic seems characteristic of the risk society; based on a feeling of threat of risks, the central idea is that one must remain a step ahead of danger and subsequently take preventive measures, even if it is not certain whether the feared risk/danger will actually materialise. In view of this parallel, it is interesting to look at possible criticism in relation to the strict variant of the precautionary principle.

4.2 Criticism of the precautionary principle

In his book, *Laws of Fear*, Sunstein summarises such criticism very concisely. He states: ‘The principle [the strict formulation of the precautionary principle; MJB/EvS] threatens to be paralyzing, forbidding regulation, inaction, and every step in between’.⁵⁶ If the risk of harm gives reason to take precautionary measures, it should be realised that taking those measures in itself gives rise to a risk of different harm. If drinking water contains a certain substance that can eventually result in serious damage to health, the precautionary principle compels the taking of measures in the form of purification of the water to remove this substance. Nevertheless, the purification method may involve certain disadvantages (e.g. high cost), with the result that people will use alternative sources of water. Yet, these alternative measures can entail other potential risks for users.⁵⁷ The precautionary principle then compels the taking of precautionary measures again, but this could result in a reversal of the measures first taken. Viewed in this way, the precautionary principle can as a rule function if the precautionary measures taken do not have any or only minor negative effects. But that is an ideal situation that will not occur readily in practice. It will almost always be possible to indicate loss items resulting from the taking of precautionary measures, even if these are just the costs of taking the measures themselves or missing out on certain benefits.

To allow the precautionary principle to function in practice, preferences must be expressed or, as Sunstein puts it somewhat more critically, one must put blinders on. It must be determined in advance which interests at risk are to be protected and which can be ignored. Only if one is willing to protect certain interests and to give up others – which will predetermine the result of the weighing of interests – can the precautionary principle function in its strict interpretation. Sunstein points out in this

⁵⁵ Fisher, above n. 53, at 290, reproaches Sunstein for criticising an interpretation of the precautionary principle that is hardly professed. In practice, mainly the ‘weak’ version of that principle is said to be used.

⁵⁶ Sunstein, above n. 9, at 13; see also C.R. Sunstein, *Worst-case Scenarios* (Cambridge, Massachusetts: Harvard University Press 2007) at 123.

⁵⁷ For this and other examples, see Sunstein, above n. 9, at 32.

context that, where dealing with risks is concerned, it is very easy for people to put on blinders *unconsciously*. He indicates several social-psychological mechanisms for this, which explain that people pay selective attention to risks. We mention three of these mechanisms, without developing them further.⁵⁸ People, for instance, pay attention to the risks they see or that are forced on them in some way or other, while simply overlooking other, perhaps greater risks. In addition, people tend to look mainly at the risk that will manifest itself in the *worst-case scenario*, even if the chance that this scenario will manifest itself is highly unlikely. Lastly, the systematic connection between risks – the fact that preventive action can create new risks – is usually ignored.

From these considerations – the paralysing effect on decision-making and people's unconscious selectivity in dealing with risks – Sunstein draws the conclusion that the precautionary principle should be rejected as a normative principle for action. Preventive action should not be taken automatically if the possibility exists that it will cause serious or irreversible harm. If preventive action is taken, it should be based on a weighing of all interests: that is, all costs and benefits involved in the preventive action. It will usually be hard to map the costs and benefits and to express or quantify them in such a way that they can actually be weighed. But that does not relieve us of the obligation to weigh all pros and cons of preventive action before taking it.

4.3 From precautionary principle to anti-catastrophe principle

Sunstein's argument does not conclude with the above-mentioned criticism of the strict formulation of the precautionary principle. Because, notwithstanding that criticism, Sunstein recognises that this principle does indeed play a certain part in situations in which there is a threat of a large, wide-ranging disaster, while the probability of that disaster occurring cannot be determined. Even if there is little chance that the disaster will occur, if it did occur, the damage would be incalculable. In such a situation, the insistence on taking precautionary measures would be great. Sunstein introduces a decision rule for choosing these precautionary measures, in the form of the anti-catastrophe principle. This principle entails that the worst possible scenario is to be considered, and that preventive measures are taken

⁵⁸ This concerns *availability heuristics*, *probability neglect* and *system neglect*. Sunstein also refers to *loss aversion* (people vote conservatively and are therefore risk averse) and *a belief in the benevolence of nature*. See, with further references to the literature, Sunstein, above n. 9, at 35, and Sunstein, above n. 56, at 17. Cf. further V.V. Ramraj, 'Terrorism, risk perception and judicial review' in V.V. Ramraj and others.(eds.), *Global anti-terrorism law and policy* (Cambridge: Cambridge University Press 2005) at 107.

to prevent that scenario. The catastrophe principle is therefore an application of the maximin rule: one chooses to maximise the minimum position.⁵⁹ Taking precautionary measures only avoids the worst conceivable position. Sunstein sets several preconditions for applying the anti-catastrophe principle. Summarised briefly, these come down to the fact that (i) the probability of the occurrence of the disaster (even if that probability cannot be determined accurately) should not be so small that all costs – disadvantages and risks – attached to taking precautionary measures are accurately mapped out, (ii) that the total costs of the precautionary measures cannot be huge, (iii) that the burdens involved in the precautionary measures cannot be placed unilaterally on specific minority groups and (iv) that in spending the available funds, one should not lose sight of perhaps more pressing social problems.⁶⁰

If one considers the formulation of the anti-catastrophe principle and the preconditions attached to it, it should be clear that Sunstein does not provide a tight decision-making schedule for taking or not taking precautionary measures to avoid a disastrous catastrophe.⁶¹ The formulation is too open for this. What constitutes a major wide-ranging catastrophe? How much material and immaterial damage can be expected? And with the first precondition in mind, how does one estimate that the chance the catastrophe will occur is small or very small, given the point of departure that the probability cannot be determined?

If we understand Sunstein well, the anti-catastrophe principle appears to be based on two considerations. First of all, the *realisation* that it is perfectly normal for a society to take precautions when the dominant perception is that a catastrophe threatens.⁶² Everyone is at liberty to question the correctness of the perception,⁶³ but that does not affect the fact that once the dominant perception that the society will be faced with a major

⁵⁹ The maximin rule comes from decision theory. In legal literature, attention is paid to this rule in, for example, John Rawls. See J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press 1999, revised edition) at 133: 'The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative, the worst outcome of which is superior to the worst outcomes of the others.' The maximin rule can also be related to Beck's *risk society*. See Beck, above n. 1, at 49: 'Basically, one is no longer concerned with attaining something "good", but rather with *preventing* the worst; *self-limitation* is the goal that emerges. (...) The utopia of the risk society is that everyone should be *spared* from poisoning'.

⁶⁰ Sunstein, above n. 9, at 109. See also Sunstein, above n. 56, at 135.

⁶¹ This is also the tenor of Fisher's criticism, above n. 53, at 291.

⁶² According to Sunstein, the anti-catastrophe principle takes 'a definitive place in both life and law'. See Sunstein, above n. 9, at 114.

⁶³ Such criticism will usually have an effect only if one can demonstrate that the fear is unrealistic: namely, that the chance the catastrophe will occur is negligibly small.

catastrophe has been established, action *will* be taken.⁶⁴ The second consideration comes down to the fact that in seeking appropriate precautionary measures, one must observe a certain degree of common sense and not take arbitrary measures. One should ensure that the precautionary measures are effective and do not themselves become a catastrophe. Considered in this way, Sunstein argues in favour of realistic and sensible decision-making with regard to the preventive approach to threatening catastrophes.

4.4 From anti-catastrophe principle to fighting terrorism under criminal law

The threat of terrorism today is considered realistic. While considerable debate exists in scholarly writing about the characteristics of modern terrorism and the threat emanating from it, the existing perception of risk is not strongly disputed.⁶⁵ This would be difficult to do because the threat analyses are often based on confidential information from intelligence and security services. Indeed, the lack of transparency does not affect the perception of a threat. On the contrary, it seems to contribute to the elusive nature of the risk, which strengthens rather than reduces the feeling of the threat. Anyone familiar with the politics of counterterrorism, with the endless pile of policy documents and literature on the threat of terrorism, knows it is inevitable to accept that in modern times considerable value is placed on taking preventive measures in the fight against terrorism, also in relation to criminal law.⁶⁶ The perceived threat of catastrophic terrorism largely dictates the taking of precautionary measures by the government.⁶⁷ The field of counterterrorism is not about a 'traditional' form of prevention in the sense of an objectifiable and knowable risk, but about potentially

⁶⁴ Cf. also B. van Klink, 'Der Mythos der verlorenen Unschuld. Gewalt und Gewaltbekämpfung in den Niederlanden' (2005) *The Tilburg Working Paper Series on Jurisprudence and Legal History No. 04/2005* at 2 <www.uvt.nl/eer/papers/WP05-04.pdf> (accessed 1 November 2008) which in this context mentions a duty of the State to 'do something about the feelings of insecurity existing in society, and Dershowitz, above n. 6, at 38, who relies on human nature.

⁶⁵ For a brief survey, see G. Mythen and S. Walklate, 'Communicating the terrorist risk: Harnessing a culture of fear?' (2006) 2 *Crime, Media, Culture* 123 at 125.

⁶⁶ Cf. also in this sense W. Hassemer, 'Sicherheit durch Strafrecht' (2006) *Strafverteidiger* 321 at 329.

⁶⁷ Cf. Beck, above n. 1, at 24: 'Risk society is a *catastrophic* society. In it the exceptional condition threatens to become the norm.' Cf. further Ramraj, above n. 58, at 113.

disastrous harm. This is exactly why far-reaching precautionary measures have been taken.⁶⁸

This outline makes it clear that the political perception of the threat of terrorist attacks can be captured effortlessly in the preconditions of Sunstein's anti-catastrophe principle: there is a threat of a large, wide-ranging disaster, while the probability of that disaster occurring cannot be determined. It is, of course, quite possible to question the classification of terrorism as a catastrophic risk. In our opinion, however, it is not at all unreasonable to consider terrorism a catastrophe.⁶⁹ This does not hold as much because each terrorist attack needs to be considered a catastrophe in itself, and it is quite possible that an actual terrorist attack will result in little damage. But one must not lose sight of the fact that terrorist attacks are committed precisely with the intention 'to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.⁷⁰ When terrorist actions succeed in realising this intention, the consequences for the stability of democratic societies are far-reaching. In our opinion, it is therefore quite possible to place the taking of counterterrorism measures in the key of the anti-catastrophe principle. It should be noted that this in itself does not justify those measures.

The conclusion is often drawn that the foregoing consideration of the precautionary principle and the anti-catastrophe principle provide viewpoints useful in assessing the desirability of and need for the criminal measures in the fight against terrorism outlined in Section 3.⁷¹ First of all, we are reminded by the fact that when the desirability or necessity of taking precautionary measures is an issue, it is inevitable that the decision-making will be based on preferences. If this were not the case, there would be a risk of paralysing the decision-making process. One should know what one wants to preserve or protect as well as what one is willing to sacrifice. For two obvious reasons, the clarity of the debate is served by expressing these preferences in exact terms. The first reason is that a debate based on general

⁶⁸ Cf. C. Aradau and R. van Munster, 'Taming the Future: the *dispositive* of risk in the war on terror' in L. Amore and M. de Goede (eds.), *Risk and the War on Terror* (London, New York: Routledge 2008) at 23; Pieterman, above n. 4, at 37, 83 and 174; M. Schuilenburg, 'De paradox van het voorzorgsbeginsel. Over "unk-unk" en uitsluiting' in D. Siegel and others (eds.), *Culture criminologie* (Den Haag: Boom Juridische Uitgevers, 2008, forthcoming).

⁶⁹ Sunstein relates the anti-catastrophe principle himself somewhat casually to counterterrorism. See Sunstein, above n. 9, at 114.

⁷⁰ See article 2 of the International Convention for the Suppression of the Financing of Terrorism (1999).

⁷¹ The viewpoints referred to here can be found in different words also in M. Valverde, 'Governing Security, Governing Through Security' in R.J. Daniels and others (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press 2002) at 84.

notions does not make it sufficiently clear what exactly should be prevented, which makes it impossible to determine what measures would have to be taken. This is illustrated by the debate over the introduction of a fundamental right to safety. Such a fundamental right does not mean anything as long as nothing is said about what 'safety' means. When one studies arguments carefully for the introduction of such a fundamental right, it usually becomes clear that they are backed by specific arguments: for example, dissatisfaction with the emphasis placed on protecting the rights of the accused. By expressing this in veiled terms, one blocks an open debate over the preferences to be made. This touches on the second reason to formulate the preferences clearly. The preference to be made largely determines which precautionary measures can be considered acceptable or not. The focus of the debate should therefore be on preferences.

The second viewpoint is the requisite indication of the costs and benefits of taking precautionary measures. This of course is an open door; careful decision-making is always based on weighing the pros and cons. Still, it is good to emphasise it with regard to precautionary measures. The cost-benefit analysis is in a certain sense a counterpart of making preferences. The precautionary measures taken are dictated to a great extent by the preferences made. But by subsequently mapping out precisely all costs and benefits of the measures to be taken, one can estimate whether the precautionary measures will also provide the expected solution.⁷² We emphasise in this regard that, certainly when the anti-catastrophe principle is involved in a legal context, one should not take the terms 'costs' and 'benefits' too literally. The point is that the disadvantages (the costs) and the advantages (benefits) should be examined. This cannot be called a literal weighing of costs and benefits in the sense of an arithmetical addition or subtraction. That would imply that one could attribute an arithmetical weight to the advantages and disadvantages to determine whether a positive or negative final balance remains. This does not diminish the fact that interests are often weighed in law, which requires a view of all interests at stake when a certain decision is made. The point is that the pros and cons can be *taken into consideration* and be the subject of debate before the decision is made to take precautionary measures. This impetus is not only intended for those who argue in favour of taking precautionary measures. Opponents should also realise that costs are involved in *not* taking precautionary measures, which should not only be compared to the benefits of not taking the measures but also related to the costs and benefits of *taking* preventive measures. In short, the argumentation must be complete.

Both these viewpoints are important for the area from which the following examples have been taken – the fight against terrorism under criminal law – an area in which Sunstein's catastrophe principle plays an

⁷² Cf. also Pieterman, above n. 4, at 181 and 195.

important part. It is especially important to assess the measures to be taken in a matter-of-fact and businesslike manner. Cost-benefit analyses are important for this, not so much in a quantitative sense but rather in the sense of taking stock of the pros and cons, viewed from practically or fundamentally different viewpoints. Such analysis can to a certain extent prevent one from being too easily tempted to take ineffective or even counterproductive measures.

5 Viewpoints with regard to a further assessment of the measures taken

5.1 Further development

The observation that a rational and businesslike assessment is necessary – based on taking into account the pros and cons – naturally cannot suffice, because the question of how to give specific shape to that assessment arises. No all-encompassing scheme can be given for that, but several relevant viewpoints and angles of approach can be explained. These viewpoints and angles of approach relate first of all to the way in which the knowledge needed to make that matter-of-fact and businesslike assessment can be gathered, and also to the organisation of the legal debate. As we have already noted in Section 2, we are concerned with the *manner* of assessment and not its outcome. For this reason – but also because of the prohibitive length of this paper – we refrain from making a further general evaluation of specific components of the current counterterrorism policy.

5.2 Acquiring the necessary knowledge

An important task for criminal law research is first of all to bear in mind what one *does not* know and therefore formulate where the gaps in knowledge can be found and what their consequences are. Characteristic of the debate on the role of criminal law in fighting terrorism is that there is no good insight into the threat situation that is the basis of all sorts of measures. The bottleneck connected with this – a good assessment of the need for the measures is not possible without specific threat analysis – has been identified, but it usually does not go beyond that. This resignation may arise from the realisation that it is characteristic of a terrorist threat to be unpredictable in nature, regarding both the chance that an attack will take place and the form in which that can or will happen. The political drive to act is rather the fear that the consequences of an attack will be catastrophic. The question is whether criminal law researchers should leave it at that. There are increasingly more calls for horizon legislation – such legislation already exists in part in some countries – and those pleas can be well founded scientifically on the basis of the inscrutability of the threat of

terrorist attacks.⁷³ Along that line, one can also seek new guarantees with a view to ‘unguided’ prosecutorial action, such as the development of rules for compensation. A step further would be to study, in cooperation with researchers from other disciplines, the extent to which more specific threat situations can be formulated. Such research is not without its complications, but it is surely worth the trouble to try.

The foregoing indicates that precisely the need to gain a better insight into the effectiveness of government measures compel us to engage in more multidisciplinary research. In relation to counterterrorism, the question frequently arises as to whether the new penalisations and prosecution powers have the intended effect, or whether perhaps the opposite effect is achieved.⁷⁴ An attempt can be made to gather more information about the availability of alternative, less far-reaching measures. For instance, with regard to penalising ‘recruitment’ or ‘training’ of potential terrorists, knowledge of the social and psychological characteristics of radicalisation processes can presumably shed more light on the usefulness of the prosecution of recruiters, partly in connection with other, non-criminal interventions in those processes.⁷⁵ Such knowledge contributes at any rate to a wise prosecution policy.

5.3 The legal debate

Suppose that one has all the relevant information about all the interests involved, or that one accepts that a consideration is based on a limited number of identified and listed interests. This is a crucial step in law, because preferences – or formulated more negatively: blinders – will then start playing a part. Attributing weight to interests largely determines the result of the weighing. This is inevitable. Here, too, the most important thing is to be aware that the preferences actually determine the choice. It is desirable as well to explain as far as possible the criteria on the basis of which the choice is determined, because the extent to which this explanation is possible is subject to limitations. What we call ‘meta-criteria’ are usually set, and are intended as guidelines for allowing far-reaching forms of

⁷³ Cf. more generally Pieterman, above n. 4, at 38 and 196 on the periodic reconsideration of precautionary measures.

⁷⁴ On the importance of striving for *evidence based* solutions, see Valverde, above n. 71, at 88. For a survey of the relatively little knowledge about the effectiveness of some counterterrorist measures, see C. Lum and others, *The Effectiveness of Counter-Terrorism Strategies: A Campbell Systematic Review* (2006) available at <www.campbellcollaboration.org> (accessed 1 March 2007).

⁷⁵ For studies of psychology and (counter)terrorism, see for example C.E. Stout, *Psychology of terrorism: coping with the continuing threat* (Westport, London: Praeger 2004, condensed edition) and J. Horgan, *The Psychology of Terrorism* (London, New York: Routledge 2005).

criminal-related government action or not. Much is written about this in relation to counterterrorism. A certain consensus seems to have been reached on the applicable meta-criteria. Often mentioned in this context are the requirements of proportionality and subsidiarity, the importance of a thorough threat analysis, a well-founded expectation that the proposed measures will be effective, respect for fundamental human rights and principles, and access to the courts.⁷⁶

The application of such meta-criteria in making assessments is undoubtedly useful, because it gives more insight into the reasons that certain choices are made. At the same time, these meta-criteria are abstract in nature, which enables both proponents and opponents to rely on the same criteria. For instance, legislators frequently argue that terrorism legislation is closely in line with the existing criminal law and prosecution system – and therefore meets the requirements of proportionality and subsidiarity – whereas scholars/criminal law commentators argue that important starting points of that system are under review, and that such legislation therefore does not meet the requirements of proportionality and subsidiarity. This does not mean that the aforementioned meta-criteria are worthless, but it is difficult to ‘operationalise’ them. In our view, therefore, a criminal law scholar should not get caught up in relying on meta-criteria. The remarks that follow relate to this.

A researcher may be expected to look at the development of preventive criminal measures in the fight against terrorism from a certain distance, and therefore adopt a rational and somewhat detached approach. This does not mean that one cannot criticise legislative amendments creating anti-terrorism measures. Not at all. However, a rational analysis should precede the criticism. We should see to it that criticism does not become a reflex every time legislation is amended. Not every amendment necessarily implies deterioration; it may indicate the need to rethink certain starting points or principles. One example of a principle that can be seen to have changed over time, and which can be given new meaning – at least in continental (European) legal systems – is the presumption of innocence. As has been argued elsewhere, one can detect an erosion of the meaning of the presumption as a limiting principle with regard to pre-trial detention.⁷⁷ This is partly because of societal developments that can be brought under the term ‘risk society’ but more importantly by being superseded by the right to liberty and the normative framework that has been drawn up in that context. This development may trigger a change in the emphasis. Indeed it is argued that the presumption of innocence is a rule of evidence and decision-making: namely, a prohibition on wrongful convictions. This entails that (1) the

⁷⁶ See for example M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press 2004) at 23.

⁷⁷ E. van Sliedregt, *Ten to One* (Den Haag: Boom Juridische Uitgevers 2009).

accused person does not have to prove his/her innocence and that (2) a person may only be convicted beyond a reasonable doubt. This 'redefinition' does not affect the rule of law character of the presumption of innocence. The point of departure is still the same: the state may not cause a person to suffer unless its right to do so has been demonstrated by law.

The above can be referred to as an attempt to keep an open mind in criminal law research with regard to a changed context and to look beyond the almost instinctive reaction to criticise and reject certain counterterrorism measures. An attempt to shift the emphasis of the presumption of innocence is also an attempt to bolster the principle in its latter capacity. As criminal law researchers, we may be well advised to find other ways to make ourselves heard when analysing and commenting upon new legislative proposals. Instead of debating with the legislature, criminal law researchers could debate more amongst themselves over the current meaning of criminal law starting points and principles and the need and possibilities to revise them. Numerous interesting, smaller research questions can emerge from such an approach. For example, as well as the question of what fundamental objections are attached to penalisations that are strongly embedded in the malicious intention of the person concerned, the question can be studied of how practical that actually is. It is one thing for the legislature to give that intention a central place in order to take criminal action at the earliest possible stage, but from a tactical point of view – think of gathering information about a possible terrorist network – disadvantages are also involved.⁷⁸

Attention should also be paid to the fact that the legislature sometimes deliberately chooses to arrange things outside of criminal law, for the purpose of evading certain criminal law guarantees. The detention of enemy combatants at Guantánamo Bay is a very clear example of this, as is the blocking of bank balances of persons on the UN or EU sanction list.⁷⁹ Less radical, but not less controversial, is a Dutch bill to subject potential terrorists to area-related and personal obligations to report by way of administrative law. On closer analysis, from the legislature's point of view there is always a certain room for choice concerning the 'legislative complex' within which shape is given to certain measures. This results in a dilemma for a criminal law researcher who participates in the debate about the way in which that room for choice is to be filled. Should one accentuate

⁷⁸ Cf. the 'Early Intervention Dilemma', as outlined by R.M. Chesney, 'Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism' (2006) *Wake Forest Legal Studies Research Paper Series, Research Paper No. 932608* <ssrn.com/abstract=932608> (accessed 27 October 2006) at 11.

⁷⁹ More and different examples can be found in L. Amoore and M. de Goede, 'Governance, risk and dataveillance in the war on terror' (2005) 43 *Crime, Law & Social Change* 149.

the criminal law guarantees and emphasise that the use of criminal law is subject to inherent limitations? In that case, the door to measures on the periphery of criminal law would be open wider. Or does one choose the position that criminal liability in the preliminary phase and the scope of prosecution powers can best be extended a bit further? Extending the criminal law playing field does, after all, have the advantage that the newly added elements will be integrated in the existing criminal law *checks and balances*. But in that case, one may throw the baby out with the bath water, because such integration will lower the level of legal protection to the level of the periphery of criminal law. Needless to say, this issue is not as black and white as we have outlined here. Here, too, it mainly concerns maintaining a balance. The main point is that, in our opinion, the emergence of preventive actions on the periphery of criminal law compels an open attitude to the possibilities of criminal law. Because what the aforementioned dilemma shows is that the position chosen on the role of criminal law does not stand alone, but can have consequences for what is happening on the periphery of criminal law.

One can criticise the options outlined for being too limited. It is conceivable that one chooses to reject criminal law as a 'legislative complex' within which antiterrorism measures can be taken and at the same time oppose the inclusion of such measures on the periphery of criminal law because of poor legal protection. There is nothing wrong with taking such a position, yet one must be aware of the political counterforce. The legislature seeks precisely the periphery of criminal law because different and in particular also fewer guarantees apply there than in criminal law. This may give rise to strategic questions. Should one completely reject the taking of measures on the periphery of criminal law because there is less legal protection compared to criminal law? Or should one make suggestions as to how legal protection can be provided for on the periphery of criminal law, without removing the distinction between alternative enforcement mechanisms and criminal law?⁸⁰ This is a dilemma. We do not presume to have any ready-made answers, but consider that we can gain from opening up criminal law research to the awareness of these dilemmas and to include them in determining positions.

6 In conclusion

The risk society is a challenging point of view from which to study the developments in current criminal law, but it is not free of problems. The

⁸⁰ This implies that one must formulate independent criteria for preventive actions outside the context of criminal law. The desirability of and possibilities for this are discussed extensively in Dershowitz, above n. 5.

concept 'risk society' can be used to explain certain developments in criminal law, particularly the increasing preventive use of criminal law. At the same time, the role of criminal law in the risk society gives rise to complex questions as to whether those developments are in keeping with the existing criminal law system. In this paper, we have explored the extent to which the precautionary principle can be helpful in assessing the emergence of preventive criminal law, in particular the fight against terrorism. Within the limitations outlined in this paper, it has proved possible to formulate some relevant viewpoints for a future research agenda. We are aware of the large knowledge gap with regard to making a good assessment of the measures taken. This should be an impetus to initiate more multidisciplinary research. Furthermore, criminal law researchers should take a rational and somewhat detached view with regard to antiterrorism legislation. Testing measures against 'meta-criteria' can produce reasonably predictable results. More interesting and challenging is the question of to what extent do fundamental principles of criminal law retain their value and meaning in the social context of, for instance, the risk society? And has their value changed over time? Our recommendations have produced no concrete results. At best they may be regarded as giving a sense of direction involving avenues of future criminal law research.